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New Criticisms of the Libel-Proof Plaintiff Doctrine

Wayne M. Serra

NEW CRITICISMS OF THE LIBEL-PROOF PLAINTIFF DOCTRINE

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I. INTRODUCTION

The libel-proof plaintiff doctrine is a creation of the federal courts. Prior to the first federal case espousing the doctrine, the concept that a plaintiff could be incapable of being libeled did not appear in state law. Thus, if the doctrine is valid, it must have a sufficient basis in applicable federal law. This paper will explore the libel-proof plaintiff doctrine and examine it in light of traditional standing and jurisdictional principles. Part II of this paper discusses the origin of the libel-proof doctrine and its application. Part III explores the general requirements for diversity actions in the federal district courts, the application of state law to those actions, and the impact of the First Amendment on state libel law. Part IV discusses standing to sue principles and analyzes the

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libel-proof plaintiff doctrine in light of those principles. Part V discusses some criticisms of the libel-proof plaintiff doctrine. Finally, Part VI concludes that because the doctrine is not defensible on either standing or jurisdictional grounds, it is probably best to dispose of individual claims using traditional principles where available, rather than branding a particular plaintiff as incapable of being libeled as a matter of law.

II. ORIGINS AND CONTOURS OF THE LIBEL-PROOF PLAINTIFF DOCTRINE

The libel-proof plaintiff doctrine appears to be an amalgamation of theories drawn from several different areas of law. Various federal courts have used the doctrine to dismiss libel suits brought under diversity jurisdiction.[2] The doctrine has evolved into two separate branches. The issue-specific branch states that an individual plaintiff is incapable of being libeled with respect to one or more issues because his reputation has already been damaged by the prior dissemination of similar information. The incremental harm branch looks at allegedly libelous statements within the context of an entire publication.[3] If the effect of nonactionable statements outweighs the damage done by the challenged statements, then the action is dismissed on the basis that the challenged statements could not have done the plaintiff any further harm.

A. The Issue-Specific Branch

The libel-proof doctrine had its genesis in the Second Circuit decision, *Cardillo v. Doubleday & Co., Inc.*[4] In *Cardillo*, the plaintiff, an inmate who was then incarcerated in a federal penitentiary, sued the publishers of a book entitled, *My Life in the Mafia*, claiming the book was libelous.[5] The book detailed Cardillo's alleged involvement in a number of crimes.[6] One of the authors was said to be a high-ranking organized crime figure who became a Government witness and whose testimony helped to convict over twenty people, including the plaintiff.[7] The district court dismissed Cardillo's complaint and granted the defendants' motion for summary judgment on the ground that the publication was protected by the First Amendment.[8] On appeal, Cardillo argued that the court erred in granting the summary judgment motion because there were disputed issues of fact relating to whether the statements were privileged.[9]

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[2]Diversity Jurisdiction is provided for by 28 U.S.C. § 1332 (1994).

[3]*See* James A. Hemphill, *Note: Libel-Proof Plaintiffs and the Question of Injury*, 71 TEX. L. REV. 401, 405-06 (1992).

[4]Cardillo v. Doubleday & Co., 518 F.2d 638 (2nd Cir. 1975).

[5]*Id.* at 639.

[6]*Id.* at 640.

[7]*Id.* at 639.

[8]*Id.*

[9]*Cardillo*, 518 F.2d at 638.

Judge Oakes, writing for the panel in a three page opinion, summarily disposed of this argument, stating, "[W]e consider as a matter of law that appellant is, for purposes of this case, libel-proof, i.e., so unlikely to be able to recover anything but nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations."[10] The opinion then went on to note that Cardillo was presently serving a twenty-one year sentence for "assorted federal felonies" and had previously been convicted of "numerous minor infractions of the law in Massachusetts where he lived."[11] Judge Oakes concluded by stating that he could not "envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages, even if Cardillo were to prevail on the difficult legal issues with which he would be faced."[12]

In his short statement that the plaintiff was libel-proof, Judge Oakes created a new legal doctrine which has been the subject of numerous debates and has been expanded to uses past libel to analogous claims, such as product disparagement. The libel-proof doctrine apparently emerged as a product of the interplay among the three cases Judge Oakes cites as support for his statement: *Urbano v. Sondern*,[13] *Mattheis v. Hoyt*,[14] and *Gertz v. Robert Welch, Inc.*[15]

In *Urbano*, the plaintiff, a convicted murderer, filed a number of libel actions against various parties for statements relating to a Federal Bureau of Investigation (hereinafter FBI) press release describing Urbano's criminal career.[16] Urbano sought leave to proceed *in forma pauperis*[17] to bring a *pro se* claim for libel.[18] After allowing the plaintiff some leeway to "amplify and clarify" his claims, the court ultimately dismissed the claims as frivolous.[19] In his opinion, Judge Zampano made it clear that the plaintiff's ability to succeed in his claims under Connecticut libel law was "virtually nonexistent" because of his inability to show damages or overcome two affirmative defenses.[20]

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[10] *Id.*

[11] *Id.* at 640.

[12] *Id.*

[13] Urbano v. Sondern, 41 F.R.D. 355 (D. Conn. 1966), *aff'd* 370 F.2d 13 (2nd Cir. 1966).

[14] Mattheis v. Hoyt, 136 F. Supp. 119 (W.D. Mich. 1955).

[15] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[16] *Urbano*, 370 F.2d at 13; *see also* 41 F.R.D. 355, 356 (listing the "rash of suits" filed by Urbano).

[17] Urbano sought leave to proceed under 28 U.S.C. § 1915(a).

[18] *Urbano*, 41 F.R.D. at 356. This memorandum opinion also disposed of a companion case in which Urbano claimed that FBI agents conspired to libel him in violation of his civil rights. *Id.*

[19] *Id.* at 357-58.

[20] *Id.* at 357.

Mattheis was similarly a libel suit by an inmate seeking leave to proceed *in forma pauperis* under section 1915(a) of the United States Code,[21] and was referenced by the *Urbano* court in its discussion of the factors that determinine whether a suit should be dismissed as frivolous.[22] The plaintiff brought a claim for civil rights violations seeking damages under provisions of federal law which had no application to his case.[23] The court construed his complaint to state a libel claim under Michigan law and civil rights claims under sections 1983 and 1985(3) of title 42 of the United States Code.[24] Mattheis had been convicted of murder and was serving a life sentence without parole.[25] His libel claim was based upon an allegedly false report that he had confessed to the crime.[26] The court stated that the challenged statements were not libelous under Michigan law and that neither the Constitution nor federal law protected the plaintiff against publication of his picture and an accompanying article about the crime.[27] Therefore, the court denied leave to proceed *in forma pauperis*, concluding that his action was wholly without merit, frivolous, and malicious.[28]

In *Gertz*, the attorney for the family of a murder victim brought a libel suit for an article which stated that the attorney was responsible for the "frame-up" of the murder defendant, a Chicago police officer, as part of a Communist conspiracy to discredit the local police.[29] The United States Supreme Court held that the attorney was not a public figure and that the publisher could not claim a First Amendment privilege simply because the statements concerned an issue of public interest.[30]

Judge Oakes in *Cardillo* cited to a secondary holding in the *Gertz* case: in public figure libel cases, "States may not permit the recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[31]

In *Cardillo* Judge Oakes faced a case factually analogous to *Urbano* and *Matheis*. However, *Cardillo* was neither proceeding *pro se* nor seeking leave to

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[21] *Mattheis*, 136 F. Supp. at 121.

[22] *See, Urbano* 41 F.R.D. at 358.

[23] *Mattheis*, 136 F. Supp. at 121.

[24] *Id.*

[25] *Id.* at 123-24.

[26] *Id.* at 124.

[27] *Mattheis*, 136 F. Supp. at 124.

[28] *Id.*

[29] *Gertz*, 418 U.S. at 323.

[30] *Id.* at 339-48.

[31] *Id.* at 349.

proceed *in forma pauperis*. Indeed, he was represented by competent counsel.[32] Oakes stated in his opinion that the court need not explore how *Gertz* may have affected New York libel law, but curiously he cited to *Gertz* for a proposition supporting his libel-proof doctrine.[33]

The following year in *Buckley v. Littell*,[34] Judge Oakes reexamined his opinion in *Cardillo*. The plaintiff, William F. Buckley, sued the defendant for allegedly libelous statements in the defendant's book.[35] One of the defenses was that Buckley was libel-proof.[36] This defense was quickly rejected because "[t]he doctrine of 'libel-proof' defendants that [the] Cardillo case enunciated is a limited, narrow one, which we will leave confined to its basic factual context."[37]

Despite Judge Oakes's effort to close the Pandora's Box opened in *Cardillo* by limiting that case to its "basic factual context,"[38] he was too late. Other circuits readily adopted the doctrine to dispose of cases on their dockets. For example, the Sixth Circuit labeled a plaintiff who sued Geraldo Rivera as libel-proof partly because of the plaintiff's past criminal activities.[39] The Third Circuit recognized the existence of the doctrine in *Marcone v. Penthouse International Magazine for Men*,[40] but refused to hold the plaintiff there libel-proof.[41]

B. The Incremental Harm Branch

The incremental harm branch grew from the recognition that some libel plaintiffs have suffered harm to their reputations which was not caused by the alleged libel.[42] The analysis focuses on the nonactionable statements in the challenged publication.[43] "Nonactionable" includes those statements both which are true or which, although false, are privileged because either they do

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[32] *Cardillo*, 518 F.2d at 638. Cardillo was represented by Maurice N. Nessen of New York. *Id.*

[33] *Id.* at 639.

[34] Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976).

[35] The allegedly libelous statements are somewhat lengthy. In sum, the statements accuse Buckley of misquoting others in his publications and never apologizing to his "victims." *Id.* at 884 n.1.

[36] *Id.* at 888-89.

[37] *Id.* at 889.

[38] *Id.*

[39] *See* Brooks v. American Broad. Co., 932 F.2d 495 (6th Cir. 1991).

[40] Marcone v. Penthouse Int'l, 754 F.2d 1072 (3rd Cir. 1985).

[41] *Id.* at 1079.

[42] *See* Hemphill, *supra* note 3, at 405-06.

[43] *Id.* at 406.

not rise to the level of "actual malice"[44] or otherwise.[45] If the statement challenged as libelous causes far less harm to the plaintiff's reputation than the nonactionable portions of the publication, the doctrine may be invoked to dismiss the claim.[46]

The federal district court for the Southern District of New York first articulated the incremental harm branch in *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*[47] There, the plaintiff sued over an unfavorable review of its new electric car in an issue of *Consumer's Digest*.[48] The challenged portion of the publication was the defendant's contention that the plaintiff's vehicle failed to meet certain federal safety standards.[49] The standards which the car reportedly did not meet were actually inapplicable to the car.[50] The court held that the actionable portions of the article could not harm the plaintiff's reputation more than the nonactionable portions of the article had already harmed it.[51]

Curiously, the Second Circuit again began to champion the libel-proof doctrine, but this time through the incremental harm branch. A decade after Judge Oakes attempted to limit the doctrine's application, Judge Kaufman, who participated in both the *Cardillo* and *Buckley* decisions, wrote the court's opinion in *Herbert v. Lando*.[52] In *Herbert*, the plaintiff, a controversial army officer during the Vietnam War, sued over allegedly libelous statements made by news reporter Mike Wallace during a segment of the television program *60 Minutes*.[53] This litigation spanned the course of a decade, reaching the Second Circuit twice and the Supreme Court once.[54] While purporting not to be applying the incremental harm branch, Judge Kaufman conceded in a footnote that "[s]ome may view our holding today as a variation of the 'libel-proof' doctrine, but we need not so characterize it."[55] Judge Kaufman then not only

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[44]*See* New York Times v. Sullivan, 376 U.S. 254 (1964). The First Amendment to the United States Constitution requires that "actual malice" be proved in certain libel cases. *Id.*

[45]Hemphill, *supra* note 3. Statements may be privileged under state law doctrines as well as because of First Amendment principles. *See* Masson, 501 U.S. at 510.

[46]Hemphill, *supra* note 3.

[47]Simmons Ford, Inc. v. Consumers Union, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981).

[48]*Id.* at 744.

[49]*Id.* at 744-45.

[50]*Id.*

[51]*Id.* at 750.

[52]Herbert v. Lando, 781 F.2d 298 (2nd Cir. 1986).

[53]*Id.* at 302.

[54]*Id.*

[55]*Id.* at 311 n.10.

affirmed the district court's grant of partial summary judgment for the defendants, he reversed the denial of summary judgment on the remaining challenged statements.[56] He also instructed the district court to dismiss the case on remand because although the challenged statements, and the implications drawn from them, were defamatory, they were not actionable.[57]

The incremental harm branch spread in its application much like the issue-specific branch. The federal district court in Massachusetts recognized the concept in another product disparagement case involving an unfavorable *Consumer's Digest* article, *Bose Corp. v. Consumers Union of the United States, Inc.*[58] An Illinois federal court applied the doctrine to dismiss a business defamation claim in *Desnick v. Capital Cities/ABC, Inc.*[59] In California, a federal district court, citing *Herbert*, applied the incremental harm branch to dismiss a suit by Engelbert Humperdinck against the *National Enquirer* for a story entitled "Engelbert Has AIDS Virus."[60]

III. DIVERSITY ACTIONS IN THE FEDERAL COURTS

The Constitution states that the judicial power of the federal courts extends to all cases and controversies between citizens of different states.[61] The "case or controversy" requirement defines for the Judicial Branch the idea of separation of powers upon which our Federal Government is founded.[62] Within constitutional limits, Congress may control which types of cases the federal courts may hear by defining the jurisdiction of the federal courts.[63] The assertion that Congress has broad authority to regulate federal courts' jurisdiction has never been challenged.[64] Rather, the Supreme Court has held

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[56] *Id.* at 312.

[57] *Id.*

[58] Bose Corp. v. Consumers Union, 529 F. Supp. 357 (D. Mass. 1981) (recognizing the doctrine, but finding it inapplicable in this case).

[59] Desnick v. Capital Cities/ABC, Inc., 851 F. Supp. 303 (N.D. Ill. 1994).

[60] Dorsey v. National Enquirer, 973 F.2d 1431 (9th Cir. 1992). Sadly, this is not an appropriate case for me to decry the fact that supermarket tabloids get to cloak themselves with First Amendment respectability, because the story itself truthfully reports that this allegation was made in court filings by a woman who had successfully brought a paternity action against Humperdinck and was now requesting further financial support for her and her daughter because of her fear for Humperdinck's health. *Id.*

[61] U.S. CONST. art. III § 2.

[62] Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982).

[63] Cary v. Curtis, 3 How. 236, 245 (1845).

[64] CHARLES ALLEN WRIGHT, LAW OF FEDERAL COURTS 36 (4th ed. 1983).

that in order for the district courts to be able to hear a particular type of case, there must be a specific statute conferring jurisdiction.[65]

For diversity actions, Congress has provided such a statute.[66] Section 1332 of the Judiciary Act grants the federal district courts original jurisdiction "of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," and where the case involves citizens of different states.[67] The requirement that citizens must be of different states has been interpreted to require "complete diversity."[68] None of the plaintiffs may be domiciled in the same state as any of the defendants.[69] As long as complete diversity exists at the time the action is brought, the district court may hear and adjudicate the case.[70]

A. Application of State Law in Diversity Cases

Federal district courts are required by the Rules of Decision Act (hereinafter RDA) to apply "[t]he laws of the several states . . . as rules of decision in civil actions . . . in cases where they apply."[71] Early judicial interpretations of this statute's predecessors held that the Act merely required the federal courts to apply state statutory law where applicable.[72] However, this interpretation was later criticized by Justice Holmes stating, "[I]n my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[73] After almost a full century since deciding *Swift*,[74] the Supreme Court in *Erie Railroad Co. v. Tompkins*[75] reinterpreted the RDA, holding that the Act required federal courts to apply the decisional law of the state courts, as well as state statutes except

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[65]"Courts created by statute [i.e., the district courts] can have no such jurisdiction such as the statute confers." Sheldon v. Sill, 8 How. 441, 445 (1850).

[66]*See* 28 U.S.C. § 1332 (1996).

[67]28 U.S.C. § 1332(a)(1).

[68]*See* PAUL M. BATOR ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1, 1664 (3d ed. 1988). The complete diversity rule was first enunciated by Chief Justice Marshall in Strawbridge v. Curtiss, 3 Cranch. 267 (1806).

[69]*Id.*

[70]*See* BATOR, *supra* note 68 at 1662.

[71]28 U.S.C. § 1652 (1996).

[72]*See* Swift v. Tyson, 16 Pet. 1 (1842).

[73]Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) (Holmes, dissenting).

[74]*Swift*, 16 Pet. 1.

[75]Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

where the United States Constitution or a federal statute preempting state law required otherwise.[76] This is the rule as it stands today.

B. The State Law of Libel and First Amendment Concerns

Libel has traditionally been a state law tort claim. "Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words."[77] The communication may be deemed defamatory "if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[78] Generally, to succeed in an action for libel, plaintiffs must prove three elements: (1) that the communication in question was defamatory; (2) that the defamation was published to a third party; and (3) that the plaintiff was identified to a third party, but not necessarily by name.[79]

The common law recognizes a tort of defamation which encompasses both libel and slander to compensate an injured party for damage to his reputation.[80] In some states, following English common law, libel is actionable *per se* without any proof of injury to reputation or other harm.[81] The concept of libel per se recognizes that some statements are "virtually certain" to cause damage and that injury to reputation is often difficult to prove.[82] In modern libel law, the United States Supreme Court has explicitly recognized that states have a legitimate interest in allowing libel plaintiffs to be compensated for the actual injury they suffer due to the publication of defamatory material.[83] "Actual injury" is defined as damage to reputation.[84]

In 1964, the Supreme Court recognized the application of constitutional concerns to many state law libel actions.[85] In *New York Times Co. v. Sullivan*, the Court stated that the law of libel "can claim no talismanic immunity from constitutional limitations."[86] The Court, in order to preserve robust public

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[76] *Id.*

[77] RESTATEMENT (SECOND) OF TORTS § 568(a) (1977).

[78] *Id.* § 559.

[79] *See* DON R. PEMBER, MASS MEDIA LAW 1, 147 (2d ed. 1981).

[80] *See generally*, David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1984).

[81] W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 1, 771 (5th ed. 1984).

[82] *See* Carey v. Piphus, 435 U.S. 247, 262 (1978).

[83] *See* Gertz, 418 U.S. at 341.

[84] *See* Time, Inc. v. Hill, 385 U.S. 374, 391 (1967).

[85] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[86] *Id.* at 269.

debate through the media, recognized that a certain number of publication errors were inevitable.[87] To preserve this debate, the Court held that a public official bringing a libel claim must prove that a statement in issue was made with "actual malice," defined as either actual knowledge that the statement is false or reckless disregard as to its truth or falsity.[88] Further, the Court held that the First Amendment requires that actual malice must be proven with convincing clarity.[89]

Since *Sullivan*, the Court has struggled to balance libel plaintiffs' interests with the First Amendment guarantee of a free press.[90] In *Curtis Publishing Co. v. Butts*, the actual malice standard for public officials was extended to those who were "public figures."[91] The Court reasoned that public figures play an important role in influencing society and usually have access to the media which enables them to correct false statements.[92] Later decisions clarified that "[m]ere negligence does not suffice."[93] Public figure libel plaintiffs must show that the author of the challenged statement either acted with "a high degree of awareness of [the statement's] probable falsity,"[94] or "in fact entertained serious doubts as to the truth of his publication."[95] Modern libel law has become a search for the proper balance between the rights of libel plaintiffs and First Amendment values.[96] Since *Sullivan*, the Court has recognized that occasionally the common law must yield to the Constitution.[97] Thus, the First Amendment now significantly limits state libel law.[98]

IV. STANDING TO SUE AND THE LIBEL-PROOF PLAINTIFF DOCTRINE

The law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations. . . ."[99] Standing is almost

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[87] *Id.* at 271-72.

[88] *Id.* at 279-80.

[89] *Id.* at 285-86.

[90] *See* Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1914 (1985).

[91] Curtis Publ'g Co. v. Butts, 388 U.S. 131 (1967).

[92] *Id.* at 164 (Warren, C.J., concurring).

[93] Masson v. New Yorker Magazine, 501 U.S. 496, 510 (1991).

[94] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[95] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[96] *See* Note, *Libel-proof Plaintiffs—Rabble Without a Cause*, 67 B.U.L. REV. 993, 995 (1987).

[97] *See* Note, *supra* note 90, at 1916. As relevant to this paper, these occasions are when, in the absence of actual malice, public officials or public figures are the libel plaintiffs.

[98] *See Masson*, 501 U.S. at 510 (noting that "[t]he First Amendment limits California's libel law in various respects").

[99] United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953).

exclusively concerned with public law questions such as constitutional determinations and the review of administrative or other governmental actions.[100] Of the judicially created doctrines designed to ensure that courts remain in a properly limited role in our society, the requirement that a litigant have standing to invoke the power of a federal court is possibly the most important.[101] "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[102]

A. Injury in Fact

Cases have long accepted the principle that Article III of the Constitution requires the plaintiff to show he was injured by the conduct he challenges.[103] In *Sierra Club v. Morton*,[104] the plaintiff claimed that the U.S. Forest Service's approval of a ski resort violated federal statutes and regulations.[105] The club sought standing by claiming it was a party "adversely affected or aggrieved" as defined by section ten of the Administrative Procedure Act (APA), thus entitled to judicial review of the Forest Service's action.[106] In its decision holding that the club lacked standing to sue because it had not alleged an injury, the court stated that the "injury in fact" test requires more than an injury to a cognizable interest.[107] The injury requirement is a "rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."[108] This attempt would be seriously frustrated if litigants were granted standing to sue under the APA simply to "vindicate their own value preferences through the judicial process."[109]

In libel cases, injury is defined as damage to one's reputation.[110] Where a plaintiff alleges he has been libeled, he is implicitly stating that his reputation has been damaged by the publication of defamatory statements of another. As previously discussed, such an allegation, even if true, does not guarantee recovery.[111] It would seem however that the allegation should ensure the

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[100] *See* WRIGHT, *supra* note 64, at 60.

[101] *Id.*

[102] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[103] *See* WRIGHT, *supra* note 64, at 123.

[104] Sierra Club v. Morton, 405 U.S. 727 (1972).

[105] *Id.*

[106] 5 U.S.C. § 702 (1988).

[107] *Sierra Club*, 405 U.S. at 734.

[108] *Id.* at 735.

[109] *Id.* at 740.

[110] *See* Time, Inc. v. Hill, 385 U.S. 374, 391 (1967).

[111] *See supra* Part III.A-B.

plaintiff has sufficient injury to meet this prong of the test for standing. The allegation seems to do this, but in libel-proof cases, it obtains only enough judicial scrutiny to see that the claim is dismissed on summary judgment.[112]

The issue-specific branch of the libel-proof doctrine appears to fit well within the injury in fact prong. Only a few lower courts have suggested that a plaintiff may be libel-proof on any subject.[113] Most courts instead have held that plaintiffs with tarnished reputations regarding particular issues may be libel-proof with respect to those issues.[114] It has been said that the law of libel is concerned with "substantial truth."[115] If so, then issue-specific libelous statements are not really libelous.[116] If there has been no libel, there has been no injury and thus the plaintiff lacks standing to sue. To illustrate this contention, take Circuit Judge Scalia's example in his opinion for the District of Columbia Court of Appeals in *Liberty Lobby, Inc. v. Anderson*,[117] where he stated that if it is reported that an individual committed thirty-five robberies when the actual number is thirty-four, the statement is likely to be nonactionable because the derogatory statement that the individual is an habitual burglar is correct and therefore the plaintiff has not been libeled.[118]

The incremental harm branch can be analyzed much the same way. If unchallenged or nonactionable statements in a publication cannot further damage the plaintiff's reputation,[119] again there is no cognizable injury and no standing to sue. The injury to the plaintiff's reputation actually was caused by statements which were substantially true or privileged under the First Amendment.[120]

B. Causation

Article III requires a "'fairly traceable' causal connection between the claimed injury and the challenged conduct."[121] In libel suits, the chain of causation is that the defendant published defamatory material about the plaintiff, thereby

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[112] *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979) (stating that summary judgment for the defendant in public figure libel cases "might well be the rule rather than the exception").

[113] *See supra* note 96, at 1910.

[114] *Id.* at 1910-11.

[115] *See* Guccione v. Hustler Magazine, 800 F.2d 298, 301 (2nd Cir. 1986) (holding the plaintiff's claims fail as a matter of law both because the statement at issue was substantially true and because the plaintiff was libel-proof with respect to the issue).

[116] *Id.*

[117] Liberty Lobby Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

[118] *Id.* at 1568 n.6.

[119] *See, e.g.*, Herbert v. Lando, 781 F.2d 298 (2nd Cir. 1986).

[120] *See, e.g.*, Marcone v. Penthouse Int'l, 754 F.2d 1072 (3rd Cir. 1985).

[121] Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978).

injuring the plaintiff's reputation.[122] Defined in this manner, the causation chain between the act of publication of defamatory material and the injury to the plaintiff's reputation seems fairly traceable. However, when the libel-proof doctrine is examined against the causation requirement, we quickly see that this is not necessarily the case.

With the issue-specific branch, a plaintiff is libel-proof where his reputation has been "so besmirched as a result of other events at the time of the alleged libelous statement, that the plaintiff's reputation would not, by the statement, be further damaged. . . ."[123] In this instance, the plaintiff cannot point to any libelous statement which has caused damage. "[F]alsehood that would harm the reputation of one person may not damage another, especially if the second person already has a bad reputation."[124] If so, causation may be lacking and the plaintiff lacks standing.

Regarding the incremental harm branch, the analysis is again similar. When considered in the context of causation, it seems that because the effect of the nonactionable statements on the plaintiff's reputation outweighs the effect of the challenged statements, it cannot be said that the nonactionable statements have caused harm. In *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*,[125] the court seemed to be focused on causation when it stated, "the portion of the article challenged by plaintiffs could not harm their reputations in any way beyond the harm caused by the remainder of the article."[126] Thus, if there is no causation, there is no standing to bring suit.

C. Redressability

Injury in fact and causation themselves are not sufficient to grant standing. The plaintiff must also show redressability; that the court, through the relief requested, will be able to grant the plaintiff satisfaction for his injury.[127] Relief from the injury must be likely to follow from a favorable decision.[128] While the causation requirement examines the relationship between the allegedly unlawful conduct and the claimed injury, redressability focuses on the connection between the alleged injury and the judicial relief requested.[129]

With both the issue-specific and the incremental harm branches, redressability does not seem to be a serious problem. Courts typically award

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[122] *See* RESTATEMENT (SECOND) OF TORTS § 568(a) (1977)).

[123] Brooks v. American Broad. Co., 737 F. Supp. 431, 443 (N.D. Ohio 1990).

[124] Hemphill, *supra* note 3, at 405.

[125] Simmons Ford, Inc. v. Consumers Union, 516 F Supp. 742 (S.D.N.Y. 1981).

[126] *Id.* at 750.

[127] *See* Allen v. Wright, 468 U.S. 737 (1984). Redress is defined as damages or equitable relief. *See also* BLACK'S LAW DICTIONARY 885 (Abridged 6th ed. 1991).

[128] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976).

[129] *Allen*, 468 U.S. at 474 n.19.

successful plaintiffs money damages to compensate for reputational injuries.[130] That being the case, it seems that any injuries fairly traceable to libelous statements are redressable by the court. That is not necessarily so, however. A plaintiff who falls within the issue-specific branch cannot maintain his suit because his reputation has already been tarnished in regards to that subject.[131] If there has been no harm, there is nothing for the court to redress. Plaintiffs who fall within the incremental harm branch cannot identify a statement which has caused harm beyond that caused by the nonactionable statements in the publication.[132] Again, without an injury, there can be no redress. With either the issue-specific branch or the incremental harm branch, without redressability the plaintiff lacks standing to sue.

V. CRITICISMS OF THE LIBEL-PROOF PLAINTIFF DOCTRINE

The libel-proof plaintiff doctrine appears analogous to traditional standing concepts. However, there is one major flaw in attempting to use standing to justify the doctrine's existence and continued application: standing is applied to federal question claims, not state law claims in federal court by way of diversity jurisdiction.[133] To bring a diversity action in a federal district court, the plaintiff must merely meet the requirements for invoking the court's jurisdiction, namely diversity of citizenship and the requisite amount in controversy.[134] If he does so, the court has jurisdiction to hear the claim.[135] Whether the plaintiff will succeed in his claim is a question controlled by state law, whether "declared by its Legislature in a statute or by its highest court."[136]

Proving diversity of citizenship is a relatively routine exercise which entails simply proving that no plaintiff shares state citizenship with any defendant.[137]

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[130] *See, e.g.*, Marcone v. Penthouse Int'l, 577 F. Supp. 318 (1983) (remitting a jury award of $537,500 in punitive damages to $200,000 and leaving undisturbed an award of $30,000 in compensatory damages); *see also* Guccione v. Hustler Magazine, 800 F.2d 298 (1986) (reversing an award of $1.00 in compensatory damages and $1.6 million in punitive damages).

It has also been suggested that instead of damages, plaintiffs should be able to sue for retractions of libelous articles. *See* Marc A. Franklin, *Good Name and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 40-46 (1983).

[131] *See* Note, *The Libel-Proof Plaintiff Doctrine*, *supra* note 96, at 1910.

[132] *See* Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986).

[133] *See* Duke Power, 438 U.S. 59, 95 (Stuart, J. dissenting). "Surely there must be some direct relationship between the plaintiff's federal claim and the injury relied on for standing." *Id.* The author has been unable to locate any cases where the Court has held that a plaintiff lacked standing to bring a state claim in a diversity case.

[134] *See* 28 U.S.C. § 1332 (1996).

[135] *See* 28 U.S.C. § 1652 (1996); Swift v. Tyson, 16 Pet. 1 (1842); Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. 518 (1928).

[136] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[137] *See* Wright, *supra* note 64, at § 14.

As long as diversity exists at the time the suit is commenced, jurisdiction exists and will not be defeated by later events.[138] Showing that the requisite amount in controversy has been met is more difficult. In general, the plaintiff must allege a claim which meets the jurisdictional amount requirement.[139] "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith."[140] To show that the jurisdictional amount has not been met, "[i]t must appear *to a legal certainty* that the claim is really for less than the jurisdictional amount to justify dismissal."[141] It does not matter that on the face of the claim there may appear a defense to part of the claim.[142] It is the amount claimed which controls, and the fact that a defense exists is not sufficient to deprive the court of jurisdiction to hear and adjudicate the matter.[143]

Damages are awarded to libel plaintiffs to compensate them for their injuries.[144] To the extent that the libel-proof doctrine seems to state that the plaintiff cannot meet the requisite amount in controversy requirement to bring a diversity case, it seems to rest on jurisdictional grounds. But examined closely, these grounds prove illusory. In personal injury diversity actions, federal courts have consistently held that damages cannot be disproven to the legal certainty necessary to show that the amount in controversy has not been met and that therefore the court lacks jurisdiction.[145] Simply because the plaintiff may ultimately recover less than the jurisdictional minimum does not mean that the court lacks jurisdiction to adjudicate the matter.[146]

It may also be said that the issue-specific branch is merely an extension of the substantial truth defense to libel.[147] To the extent that the doctrine merely mislabels the substantial truth defense, it is defensible. However, the issue-specific branch goes further. It states that the plaintiff is *incapable* of being libeled.[148] Some states have retained the theory that a statement can be libelous per se.[149] In these jurisdictions, the plaintiff is entitled to nominal damages

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[138] *Id.* at § 28.

[139] *Id.* at § 33.

[140] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

[141] *Id.* (emphasis added).

[142] Schunk v. Moline, Milburn & Stoddart Co., 147 U.S. 500 (1892).

[143] *See* Wright, *supra* note 64, at § 33.

[144] *See* Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. at 1914-15.

[145] *See* Carlough v. Amchem Prods. Inc., 834 F. Supp. 1437 (E.D. Pa. 1993).

[146] *See* WRIGHT, *supra* note 64, at § 33.

[147] *See Guccione*, 800 F.2d at 303 (finding the plaintiff libel-proof because the statements alleged libelous were substantially true).

[148] *See* Brooks v. American Broad. Co., 932 F.2d 495 (6th Cir. 1991).

[149] *See Marcone*, 754 F.2d at 1079-80 (applying Pennsylvania law).

despite the statement's substantial truth.[150] However, federal courts, by applying the issue-specific branch of the doctrine, have denied plaintiffs even nominal damages and also the punitive damages that sometimes accompany them.[151]

The issue-specific branch seems grounded in the proposition that the allegedly libelous statements already have been widely disseminated.[152] Judge Scalia's opinion for a unanimous panel of the District of Columbia Court of Appeals in *Liberty Lobby v. Anderson*,[153] dismisses this argument by stating that, "10,000 repetitions are [not] as good as the truth." Scalia noted that he could not "envision how a court would go about determining that someone's reputation had already been 'irreparably' damaged - i.e., that no new reader could be reached by the freshest libel."[154] He also stated that the rule does not further any significant First Amendment values.[155]

Scalia similarly attacked the incremental harm branch of the doctrine stating that at least in public figure cases, unchallenged portions of a publication are not necessarily unchallenged because they are true.[156] It may also be the case that the plaintiff simply cannot prove that the statements were willfully false or made with reckless disregard to their truth or falsity.[157]

> In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us - or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse.[158]

If the libel-proof plaintiff doctrine is not defensible on any of these grounds, then what exactly is the doctrine? There are two things the doctrine is not: it is not a part of state law[159] nor is it part of First Amendment doctrine.[160] Once

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[150] *See, e.g.*, N.Y. PENAL LAW § 255.17 (McKinney 1980).

[151] *See Guccione*, 800 F.2d at 299 (reversing judgments of $1.00 compensatory and $1.6 million punitive damages).

[152] Wynberg v. National Enquirer, 564 F. Supp. 924, 928 (C.D. Cal. 1982).

[153] Liberty Lobby v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

[154] *Id.* at 1568.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Liberty Lobby*, 764 F.2d at 1568.

[159] *Id.* at 1568-69 (categorizing the libel-proof cases as "decisions of federal courts interpreting state law in the absence of state law guidance").

[160] Masson v. New Yorker Magazine, 501 U.S. 496, 523 (1991) (rejecting specifically the contention that the incremental harm branch is compelled by First Amendment doctrine); *see also* Anderson v. Liberty Lobby, 746 F.2d at 1569. "Because we think it a

these contentions are disposed of, we are left with what looks like what was decried in *Erie* and its progeny: an impermissible species of federal common law, bound to encourage forum-shopping among litigants.[161]

Justice Brandeis stated that there is no federal general common law available from which federal judges can draw to decide state law claims.[162] Federal courts, sitting in diversity actions, should reach the same results as if a state court had heard the case.[163] In this way federal and state courts coexist without litigants seeking one forum over the other, attempting to manipulate the outcomes of their cases.[164] The libel-proof plaintiff doctrine has great potential to encourage forum shopping and disrupt this coexistence. Public figure plaintiffs with besmirched reputations have an incentive to bring their suits in state courts for fear that a federal court will declare them libel-proof and thus dismiss their suit. Defendants, on the other hand, have a strong incentive to try to remove cases filed in state courts to federal courts to have easier access to the defense.[165] Both these results are not only undesirable but impermissible.

VI. CONCLUSION

Federal Courts exercising diversity jurisdiction are bound to apply state substantive law. When hearing libel actions, the defendant often has the defense of a First Amendment privilege to publish the challenged statements. Typically, the trial of such a case involves two principal inquiries: whether the defendants have harmed the plaintiff's reputation within the meaning of state law, and if so, whether the First Amendment precludes recovery.[166]

When answering the first of these questions, federal courts have applied the libel-proof plaintiff doctrine to state that the plaintiff is either incapable of being libeled on the particular subject matter or that the libelous statements when taken in context are incapable of doing any harm beyond that caused by non-actionable statements. The libel-proof plaintiff doctrine, applied in these manners, bears a resemblance to traditional standing doctrine. However, it cannot truly be a standing concept because standing is applied to ensure that the proper plaintiff is presenting a particular federal claim. In libel-proof plaintiff cases, the federal question arises by way of a defense—a First Amendment privilege to publish the material.

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fundamentally bad idea, we are not prepared to assume that it is the law of the District of Columbia; nor is it part of federal constitutional law." *Id.*

161 *See* Erie, 304 U.S. 64.

162 *Id.* at 78.

163 *See* WRIGHT, *supra* note 64, at § 60.

164 Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

165 "Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants to the district court of the United States. . . ." 28 U.S.C. § 1441 (1994).

166 *See* Steaks Unlimited v. Deaner, 623 F.2d 264, 270 (3rd Cir. 1980).

When federal courts apply the libel-proof plaintiff doctrine in a diversity case where state libel law has no such concept, they are engaging in an impermissible activity—that of creating a generalized "federal common law" which conflicts with state law. This is exactly the sort of activity which encourages forum-shopping and was denounced in *Erie*. In these cases, courts need to be clear in their decisions. The analysis summarized by the Third Circuit should be adhered to. First, analyze the statements in light of state libel law. Only then should the question of First Amendment privilege be addressed. In this manner, courts can dispose of nonmeritorious claims, protect First Amendment values, and stay true to the proper role of a federal court in a diversity action. Because both branches of the libel-proof doctrine interfere with this process, the doctrine should be abandoned in its entirety.